IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 58 OF 2000

Shri Dayanand Ramakrishna
Kotkar, major of age,
businessman, resident of
Kotkar Vado,
Pernem - Goa. ... Appellant/Plaintiff

versus

Shri Elias Mascarenhas,
major of age, bachelor,
businessman, resident of
Maus Wado,
Pernem - Goa. ... Respondent/Defendant

Mr. J. P. Mulgaonkar, Advocate for the Appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 30TH SEPTEMBER, 2005.

ORAL JUDGMENT

This second appeal is filed at the instance of the plaintiff in R.C.S. No. 39/97.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The plaintiff's suit for permanent and mandatory injunction was decreed by the trial Court by Judgment/Decree dated 16-3-1999. The appeal having been filed by the defendant, the said Judgment/Decree was reversed by the learned Additional District Judge, Panaji, vide her Judgment/Order dated 21-9-1999. By Order of this Court dated 14-9-2000, this second appeal was admitted on a substantial question of law i.e.

Whether the findings recorded by the learned Additional District Judge were contrary to the evidence on record.

4. There is no dispute as regards the facts. The plaintiff was having a stall admeasuring about 20 sq. metres from the year 1992 or so. Likewise, there was another stall held by Digambar Bandekar. Both the stalls were held on lease from Pernem Municipal Council and were situated in the land of the said Council. Inbetween the stall of the plaintiff and that held by the said Digambar Bandekar there was an open space. In the year 1994, the plaintiff with the permission of the said Municipal Council dated 12-1-1994 extended his stall by another 30 sq. metres as can be seen from the said licence/permission Exh.PW1/C colly which is annexed with a plan.

The defendant purchased the stall of Digambar Bandekar in the year 1995. This stall appears to have been of wooden material and the defendant obtained permission from the said Municipal Council and reconstructed the said stall. It appears from the evidence of D.W.2, the Municipal Engineer that the defendant was given a licence to substitute the wooden shed of the defendant into masonary stone walls and the defendant was required to do the reconstruction within the plinth area but the defendant extended the plinth area while reconstructing the said stall by about 2 sq. metres or so and also increased the height by another 30 to 40 cms.

5. The plaintiff filed the suit with an allegation that the defendant in October, 1995, had demolished the wooden stall and had encroached the land towards the western side thereby reducing the gap of 1 meter and touching the shed/stall of the plaintiff as well as the coconut tree existing inbetween and that the water from the asbestos sheets used by the defendant to cover his stall/structure during rainy season fell on the suit premises of the plaintiff. The plaintiff had examined himself in support of his case as well as another witness. The defendant had examined his Attorney, the Municipal Engineer as well as the mason who had reconstructed the stall of the defendant.

6. The learned trial Court after considering the evidence led by the parties came to the conclusion that the water from the roof of the defendant's stall was falling upon the suit premises of the plaintiff because the asbestos sheet roofing was projecting beyond the western wall of the defendant's stall and if a portion of the said asbestos sheets of the roof of the wall projecting beyond was removed, the eaves water from the stall of the defendant will fall half meter away from the suit premises. The learned trial Court further held that the plaintiff had a right to stop the eaves water from the roof of the plaintiff's stall from falling upon the suit premises, by removing the extension.

7. However, the learned Additional District Judge felt that the trial Court had failed to appreciate the evidence in a proper light and was duly carried away by random statements made by defence witnesses that the water pipeline was now passing through the wall of the defendant's stall to jump to the conclusion that there was encroachment by the defendant.

8. Mr. J. P. Mulgaonkar, the learned Counsel appearing on behalf of the appellant/plaintiff submits that the legality of the stalls of either the plaintiff or the defendant were not at all in issue between the parties and the learned Additional District Judge appears to have been carried away by

the fact that the plaintiff had no right to extend the area of 30 sq. metres. Mr. Mulgaonkar, the learned Counsel submits that either the plaintiff or the defendant might have encroached upon the land of the Municipal Council but the defendant could certainly not be allowed to have a construction of which the eaves water fell over the stall of the plaintiff.

9. On the other hand, Mr. S. D. Lotlikar, the learned Senior Counsel appearing on behalf of the respondent submits that the plaintiff had no right to the open space encroached by him upon the land of the said Municipal Council and in case he was an encroacher in equity he could not complain that the eaves of the roof of the stall of the defendant were falling upon the stall of the plaintiff. Mr. Lotlikar, the learned Senior Counsel has also pointed out that the lease agreement was executed only on or about 21-1-1997 and although, the suit was filed on 12-12-1997 there was no whisper to the said lease agreement in the pleading of the plaintiff. Mr. Lotlikar further submits that the defendant might have extended his stall but there was no evidence on record to show that the extension was particularly on the side of the plaintiff on account of which water from the roof fell over the roof of the plaintiff. Pointing out to the evidence of the plaintiff, on internal page 24, Mr. Lotlikar submits that if the water of the roof of the plaintiff fell upon the open space, the water from the roof of the

defendant also ought to fall into the open space and could not fall upon the roof of the plaintiff.

10. As already stated, the plaintiff was having his stall with an area admeasuring 20 sq. metres from the year 1992 or thereabout and by virtue of licence/permission obtained by the plaintiff from Pernem Municipal Council, the plaintiff extended his stall by about 30 metres as can be seen from the plan/licence Exh.PW1/C. It is true that at that time, the plaintiff did not have a lease agreement in respect of this extended area but the fact remains that the plaintiff got a lease agreement executed subsequently on or about 21-1-1997. Admittedly, the plaintiff was occupying the said area of 50 sq. metres with the permission of the said Council, whether rightly or wrongly given, and if at all the defendant had any grievance that the plaintiff was wrongly allowed to use the said area of 50 sq. metres the defendant's remedy lay elsewhere. The plaintiff had categorically stated that the eaves water from the roof of the defendant fell into the kitchen/shed and on that count he was suffering from damages and that he had requested the defendant to rectify the roofing so that the eaves water would not fall into their property which request the defendant refused to comply. Likewise, the plaintiff's witness Tulsidas Mavalkar had also stated that the eaves water of the roof of the defendant's stall falls on the suit premises i.e.

to say the kitchen of the plaintiff's hotel. The defendant's own witness namely, the Municipal Engineer had not supported the case of the defendant but on the contrary had stated that the defendant had extended the plinth area whilst contructing the stall and had also increased the height by 30 to 40 cms. Likewise, the defendant's mason, DW3/Manohar Nagvekar instead of supporting the defendant had stated that he did not know whether if the eaves water of the defendant's stall touched the plaintiff's stall. If, water from the roof of the plaintiff's stall falls in the open space whilst the water from the defendant's stall falls over the roof of the plaintiff, it is probably because the roof of the stall of the defendant is on higher level than the roof of the plaintiff and it is for this reason that the eaves water from the asbestos sheets of the defendant's stall falls on the roof of the plaintiff. As long as the plaintiff was having the said extension with the permission of the Pernem Municipal Council, whether rightly or wrongly given, the defendant had no right to extend his stall and that too without the permission of the Pernem Municipal Council and allow the water from the asbestos sheets of his roof to fall on the roof of the plaintitff's stall. The learned trial Court had rightly decreed the suit by appreciating the evidence in proper perspective. The learned Additional District Judge appears to have been more influenced by the fact that the plaintiff was a Councillor and had used his power to forestall the inquiry into the complaint of the defendant.

11. In the above view of the matter, the substantial question of law framed deserves to be answered in favour of the plaintiff. Consequently, this second appeal is allowed and the Judgment/Order dated 21-9-1999 of the learnd Additional District Judge is hereby set aside and that of the learned trial Court dated 16-3-1999 is restored with no order as to costs.

12. Nevertheless, it is made clear that the defendant inorder to comply with the Decree dated 16-3-1999 would be at liberty to provide a channel or any other contrivance to ensure that the water from the roof of the defendant does not fall over the roof of the plaintiff as it stands.

N. A. BRITTO, J.

RD.